No. 86-628

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Supreme Court, U.S.
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1986

In the Matter of KATHY G.J. (ANONYMOUS),

*Petitioner,*

vs.

ARNOLD D. (ANONYMOUS),

*Respondent.*

ON PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

## BRIEF IN OPPOSITION

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## Statement of the Case

### A. Family Court Proceedings

Petitioner is the unmarried mother of Jennifer D. (Anonymous). The child was born October 23, 1976. On October 8, 1977, petitioner commenced a paternity proceeding, pursuant to Article 5 of the New York Family Court Act ("F.C.A."), against respondent in Family Court, Queens County. Respondent is married to another woman and has four marital children. (Petition ["Pet."] 2). He and petitioner were never married and never lived together. (Pet. 15a).

On May 21, 1980, following a hearing, Family Court Judge Bruce M. Kaplan issued a decision and order finding respondent to be Jennifer's father and requiring him to pay $100 a week temporary child support. (Pet. 2). The Appellate Division, Second Department, affirmed. 80 A.D.2d 896 (1980).

On June 7, 1984, following a hearing, Judge Kaplan issued a decision and interlocutory order setting Jennifer's permanent support needs at $257 a week, with respondent liable for 95 percent of this amount, retroactive to June 13, 1982, the earliest date for which petitioner had proven her expenses. (Appendix to this brief ["Resp."] 37a). He also granted up to $12,000 a year for school expenses. On June 25, 1984, Judge Kaplan entered a dispositional order based upon the interlocutory order. (Pet. 3-4).

In one of the portions of Judge Kaplan's decision that petitioner notably omits from her appendix*, he found that

* Contrary to ordinary practice, see, e.g., Supreme Court Rule 30.5, the petition presents a collection of excerpts from the trial court decision as if it were a complete section of the opinion, without indicating that there are six major elisions from the body of the excerpts. The decision is set out in full in the Appendix at pages 1a to 39a below.

with the award he was making,

> "it is certain that Jennifer will receive a level of support that more than meets a level that is fair and reasonable." (Resp. 2a).

The trial judge further found that petitioner repeatedly lied about her expenses (Resp. 30a-33a) and

> "seemingly blurred the distinction between sums to be used for her daughter's benefit and those for herself." (Resp. 33a).

B. The Appellate Division Order

Petitioner appealed to the Appellate Division, Second Department, from the interlocutory and dispositional orders.* She claimed that child support for non-marital children was unconstitutionally determined under a different statutory standard (F.C.A. §§ 513, 545) than child support for marital children (F.C.A. §

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* The Attorney General intervened on the appeal as a party respondent in defense of the constitutionality of State statutes, pursuant to New York Civil Practice Law and Rules ("C.P.L.R.") § 1012(b). (Pet. 22a).

413). The Appellate Division disagreed. It found that all but one of the factors enumerated under the marital child support statute for consideration in marital child support decisions are impliedly to be considered in non-marital child support decisions as well. The only potential difference between the statutes is that under Article 4, the courts are to consider the standard of living of a marital family where "practical and relevant", while in Article 5 proceedings, consideration of the standard of living requires some showing that the child's parents had formed a "non-marital family". (Pet. 11a; 116 A.D.2d 247).

The court found that the difference in the wording of the statutes is reasonable because marital families usually have lived together. As a result, consideration of the family's standard of

living -- where "practical and relevant" -- is appropriate and may save the child some of the trauma of the divorce. (Pet. 12a). In contrast, the parents of a child involved in a paternity proceeding usually have not lived as a non-marital family, and consideration of "the family's" standard of living is thus neither "practical" nor "relevant". (Pet. 12a). Where the parents of a non-marital child have in fact lived together as a non-marital family and established a standard of living, the Appellate Division observed, the courts have properly ruled that the standard of living is to be taken into account in determining the support level, "notwithstanding the non-marital status of the child." (Pet. 12a-13a, citing Matter of Carolyn C. v. Frank G., 106 Misc. 2d 510 [Fam. Ct. N.Y. Co. 1980]). The distinction in the wording of the statutes thus has "an important,

valid and constitutional" reason at its basis. (Pet. 11a).

Accordingly, the Appellate Division affirmed the dispositional order*, but modified it to cover certain school expenses, to make respondent liable for 100 percent of Jennifer's support, and to change the effective date of the order to the date it was first applied for, October 8, 1977. The matter was remitted to the Family Court for calculation of arrears. (Pet. 25a).

C. Motions For Leave To Appeal To The Court of Appeals

Petitioner and respondent moved separately in the New York Court of Appeals for leave to appeal. Respondent also applied for a stay. (Pet. 4). The Court of Appeals denied the motions on July 3, 1986. (Pet. 1a; 68 N.Y.2d 713).

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* The court held that no appeal lay from the interlocutory order and dismissed that appeal. (Pet. 22a)

In apparent reference to the provision in the Appellate Division's order remitting the proceeding for calculation of arrears, the Court of Appeals held that the order appealed from was not sufficiently final under the New York Constitution for review. (Pet. 2a). See N.Y. Const., Art. 6, § 3(b)(1), (6).

## POINT I

### THIS COURT LACKS JURISDICTION TO REVIEW THE COURT OF APPEALS' ORDER AND PETITIONER HAS NOT SOUGHT REVIEW OF THE APPELLATE DIVISION'S ORDER.

Although the petition for writ of certiorari is labelled in caption and body as directed to the Court of Appeals, the argument in the petition actually challenges the Appellate Division's April 7, 1986, order upholding the constitutionality of F.C.A. §§ 513, 545.

Assuming arguendo that the Appellate Division order was sufficiently final for

the purposes of this Court's jurisdiction, see New York v. Cathedral Academy, 434 U.S. 125, 128 n. 4 (1977), the petition should have been directed to that order inasmuch as the Court of Appeals' dismissal was on jurisdictional grounds.* R.J. Reynolds Tobacco Co. v. Durham County, ___U.S.___, 55 U.S.L.W. 4034, 4036 (December 9, 1986). Petitioner's failure to seek review of the correct order requires denial of her petition.** See 28 U.S.C. § 1257(3);

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* Since the Appellate Division order was not final under New York law, there could not be an appeal, either by leave (N.Y. Const., Art. 6, § 3[b][6]; C.P.L.R. § 5602[1][i]) or as of right (N.Y. Const., Art. 6, § 3[b][i]; C.P.L.R. § 5601[b][1]).

** Petitioner alleges that the statute conferring jurisdiction is 28 U.S.C. § 2103. (Pet. 2). Section 2103, however, authorizes an improvidently taken appeal to be regarded as a petition for certiorari. Since there was no appeal here in the first instance, petitioner has failed to plead a jurisdictional basis for her petition.

R.J. Reynolds Tobacco Co. v. Durham County, supra, 55 U.S.L.W. at 4036; Norfolk & Suburban Turnpike Co. v. Virginia, 225 U.S. 264, 267-9 (1921); Western Union Telegraph Co. v. Crovo, 220 U.S. 364, 366 (1911).*

## POINT II

### THE PETITION RAISES NO ISSUE MERITING REVIEW BY THIS COURT.

Assuming arguendo that petitioner had sought review of the Appellate Division's order and that it was otherwise proper for this Court to review that order, the Court should in any event deny certiorari. Petitioner has not shown that the case presents a substantial Federal question or a conflict with the

* Petitioner could hardly maintain, and does not, that this Court has jurisdiction to decide the sole question determined by the Court of Appeals, i.e., whether the Appellate Division order finally determined the proceeding within the meaning of the New York State Constitution.

decision of another State court of last resort or of a Federal court of appeals.

1. Non-marital and Marital Children Are Provided Equal Treatment under New York Law in the Consideration of Child Support Orders.

The petition should be denied because no serious argument can be made that petitioner was denied equal protection of the laws. With one apparent exception, the same factors are impliedly to be considered under the non-marital child support statutes (F.C.A. §§ 513, 545) as under the marital child support law (F.C.A. § 413). (Pet. 11a). The only difference between the statutes is that section 413 provides that "where [it is] practical and relevant", the court is to consider

> "the standard of living the [marital] child would have enjoyed had the family remained intact."

F.C.A. § 413(1)(iii). However, as the Appellate Division made abundantly clear,

under section 545, a non-marital family's standard of living will be considered in determining support for a non-marital child, if such a unit ever existed. Similarly, a marital family's standard of living is only to be considered where "practical and relevant". There is thus no real distinction between the statutes. (Id.).

Moreover, petitioner does not claim to have established a non-marital family with respondent. (Pet. 15a). She thus fails to show that she would have qualified for different treatment than she received if the non-marital child support statutes were identical to the marital child support provision.

2. The Review of Concurrent Findings of Fact.

Petitioner suggests that there was insufficient evidence for the amount of child support awarded: she calls for

further discovery in her Question 3. This Court, however, will not review

> "concurrent findings of fact by two courts below in the absence of a very obvious and exceptional showing of error."

Graver Tank & Mfg. Co. v. Linde Air Products Co., 336 U.S. 271, 275 (1949).

Here, the trial court granted an award of child support that it found "fair and reasonable" under the circumstances. (Resp. 2a). The Appellate Division affirmed the trial court's findings of fact, differing only "as to the manner in which certain issues should be resolved." (Pet. 7a). It further approved "the fairness" of the award, making only minor changes in petitioner's favor. (Pet. 17a-20a). These concurrent findings of fact are reasonable and do not justify review by this Court.

## CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: New York, New York
December 22, 1986

Respectfully submitted,

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# APPENDIX

[1] FAMILY COURT OF THE STATE OF NEW YORK
CITY OF NEW YORK : COUNTY OF QUEENS
----------X

In the Matter of :

KATHY [J. (Anonymous)], : DOCKET NO. P-7212/77

Petitioner, :

-against- : DECISION AND ORDER

ARNOLD [D. (Anonymous)],:

Respondent. :

----------X

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KAPLAN, J.:

A paternity trial encompasses two distinct segments, the determination of paternity, and an award of child support. Only if the Petitioner is successful in establishing paternity does the matter proceed to the imposition of an order for

the "necessary education and support of the child by each parent. F.C.A. § 513, which shall be fair and reasonable according to their respective means." F.C.A. § 545.

I. The Appropriate Standard for Child Support

The Court will make its award of child support pursuant to F.C.A. §§ 513 and 545 based on a consideration of: 1) the income and expenses of Respondent 2) the income and expenses of the child and 3) the income and expenses of the Petitioner. It will utilize F.C.A. §§ 513 and 545 as its [2] exclusive criteria.

The Court rejects Petitioner's oft recurring urgings that there can be no permissible distinction between the manner in which support is fixed for a marital and a non-marital child.

The distinction was clearly intended by the Legislature. This is

evidenced by a law passed in 1983 which amended the Domestic Relations Law § 32, and the Family Court Act § 413 by enumerating 5 relevant factors which the Court must take into consideration in fixing a child support award.

At the same time it was conspicuously silent with regard to F.C.A. §§ 513 and 545.

The Court is well aware, and is in enthusiastic agreement with recent judicial pronouncements and statutory codifications expanding and extending the rights of non-marital children.

It has been observed that an order of filiation vouches safe to a non-marital child the following rights:

> "rights of inheritance (EPTL 4-1.2, subd.a, par. 2); the right to recover benefits under the New York Worker's Compensation Law § 2, subd. 11), the Veteran's Benefits Act (US Code, tit 38, § 101, subd. 4, par. A) and the Social Security Act (US code tit 42, § 416, subd. h, par. 3, cl. A); the right to recover serviceman's life insurance

> proceeds (US Code, tit 38 § 765, subd. 9) and a military allowance (US Code, tit 37, § 401, subd. 2) and the right to notice of adoption proceedings (Domestic Relations Law § 111-a, subd. 2, par.a). A filiation order must also be filed with the Putative Father Registry which records, inter alia, the names of persons adjudicated to be fathers of children born out of wedlock (Social Services Law, § 372-c." Kordek v. Wood, 90 A.D.2d 209 (4th Dept., 1982) at 212.

[3] It is equally true that the U.S. Supreme Court has articulated a sensitivity to the rights of non-marital children in such cases as Gomez v. Perez, 409 US 535 and Mills v. Habluetzel, 456 US 91.

Petitioner relies on Maio v. Pierce, 72 A.D. 2d 943 (4th Dept., 1979) but is is inapposite in the instant situation.

Maio, supra, holds that a father cannot prefer a marital child over a non-marital child where he claims he lacks adequate resources to support both, and that he is equally obliged to support both children. It does not mean that he

is required to support each child in the same manner where the moneys allocated to the marital child in no way impair his ability to support his non-marital child irrespective of the amount awarded.

Lest there be any misapprehension of the Court's position, this Court wishes it to be entirely clear that the amount awarded for Jennifer's support was not diminished by as much as a penny because Respondent is presently supporting his 4 marital children.

While its possible that Jennifer may not be treated in the same manner as Respondent's marital children such a belief would be speculative. An ineluctable conclusion since the Court foreclosed inquiry into the standard of living of Respondent's children.

However, it is certain that Jennifer will receive a level of support that more than meets a level that is fair and

reasonable.

In Ellen N. v. Stuart K., 88 Misc.2d 280 (Fam. Ct., Onondaga Co., 1976) Judge McLaughlin in a [4] characteristically cogent opinion held that Article 5 and Article 4 of the Family Court Act prescribe different standards of support. He further found that these distinctions were based on a reasonable classification, and therefore passed constitutional muster.

This Court reviewed this very point in the context of its November 23, 1982 Memorandum Order. It stated:

> Being liable for paying an amount of support that is fair and reasonable for the support of a member of a family unit (FCA .413) cannot be equated with being "liable for the necessary support and education of the child." (FCA .513) (underscoring added).
>
> The constitutional rights of a non-marital child are not violated merely because he or she may be treated differently than a marital child. Matter of Lalli, 43 N.Y.2d 65 (1977), aff'd sub nom Lalli v. Lalli, 439 U.S. 259. Indeed children born out of wedlock are not granted suspect classi-

> fication. Matthews v. Lucas, 427 U.S. 495. Only when no rational basis exists for legislative action respecting them are constitutional considerations implicated.
>
> Judge McLaughlin's reasoning remains eminently sound notwithstanding L. 1981 ch. 300 which amended FCA .545 to provide that orders of support be made having regard to the respective ability of each parent to provide support.
>
> That amendment codified decisional law which held that a Court should consider the means of the father in making an order of support. Nardone v. Coyne, 23 A.D.2d 819 (4th Dept., 1974), aff'd 18 N.Y.2d 626."

The thrust of the Supreme Court cases dealing with equal protection of non-marital children is addressed to areas of general rights and entitlements.

[5] The Court reaffirms its adherence to that reasoning. Non-marital children are entitled to qualify for the same statutory benefits respecting the bringing of actions relating to inheritance and survivorship, and to qualify for benefits awarded to persons by virtue of their being the children of a particular father.

It is unwarranted to utilize those holdings in support of the premise that non-marital children are entitled to child support in the same dollar amount as marital children in the absence of identical statutory criteria.

Petitioner's assertion in this regard constitutes a denigration of marriage, an institution occupying a place in the forefront of our most honored social traditions.

The expanding recognition of the breadth of the dimensions of the marital estate led to the passage of the Equitable Distribution Law. There was explicit recognition of the fact that marriage constitutes an economic partnership which on dissolution requires a valuation of the contributions, economic and non-economic, of each spouse.

An award of child support in a matrimonial action entails recourse to

any number of complex factors inextricably intertwined with the marital standard of living.

This fact was made abundantly clear with the passage of L. 1983, Ch. 362 which mandated consideration of all relevant factors including five specific ones, when fixing support for marital children.

It would do violence to the recently articulated will of the Legislature to treat non-marital children in [6] exactly the same way as marital children as it would to permit non-married persons, without formal contract, to obtain equitable distribution.

II. Respondent's Net Income

During the long hiatus between the establishment of paternity and the hearing on support, Respondent's attorney voluntarily furnished the Court and Petitioner's counsel with Respondent's

tax returns and financial statements for the past several years. Since Petitioner introduced this information into evidence it will be utilized by the Court to determine Respondent's average income and net worth.

It should be noted parenthetically that this information was not deemed sufficient by Petitioner's counsel. He filed a battery of voluminous unsuccessful discovery motions.

He sought to have the Court equate a paternity proceeding with a matrimonial action and disregard the clear distinction between the two embodied in wholly separate and distinct statutory schemes. The result of this ill advised strategy and vacillation respecting deposing a person conversant with Respondent's finances served only to delay the commencement of the support proceedings.

The order of magnitude of Respon-

dent's net income is such as to avoid any reference to his gross income.

Respondent's taxable income was $691,373 in 1979 (Petitioner's Exhibit 6 in Evidence), $1,340,552 in 1980 (Petitioner's Exhibit 7 in Evidence), and $701,206 in 1981 (Petitioner's Exhibit 8 in Evidence). These figures average $911,043.66 per year.

[7] Respondent's net worth was calculated at $7,673,600 on December 31, 1980 (Petitioner's Exhibit 9 in Evidence), $8,149,295 on June 30, 1981 (Petitioner's Exhibit 10 in Evidence).

Respondent's other financial statements (Petitioner's Exhibit 11-13 in Evidence) showed a substantially reduced net worth but since they employ a markedly different format they will be disregarded.

III. Jennifer [D. (Anonymous)]'s Needs and Expenses

The inquiry next turns to the needs and expenses of Jennifer [D. (Anonymous)].

Respondent's counsel's memorandum correctly points out that Petitioner's counsel did not request that the Court award a specific amount for child support, nor did Petitioner present a detailed budget of the child's expenses.

It is understandable that Petitioner wished to avoid the dilemma of having the child's needs implicitly measured by the amounts she was able to expend given her means which are extraordinarily modest relative to those of Respondent.

It has long been the law of the state that the child's needs were not to be measured solely by the mother's means, a precept that has been applied with ever increasing vigor. Indeed the teachings of Schaschlo v. Taishoff, 2 N.Y.2d 408; and Nardone v. Coyne, 23 A.D.2d 819 (4th

Dept., 1965), aff'd 18 N.Y.2d 626 are part of the mainstream of the evolving and expanding rights of non-marital children.

The fact that the custodial parent of a non-marital child lacks the financial resources to provide [8] adequately for the child's needs does not mean that those needs do not exist. Rather it means that the custodial parent is presently incapable of meeting those needs absent significant contribution from the non-custodial parent.

While it is incumbent on Petitioner to demonstrate Jennifer's needs, it is not necessary for her to do so solely through proof of expenses actually incurred. It is enough that Petitioner prove by competent evidence that Jennifer has particular needs, and what sums are necessary to meet them.

A. Private School Education

For example, Petitioner requested that the order of support encompass the cost of private school education for Jennifer. In support of this request she introduced as (Petitioner's Exhibit 41 in Evidence) a report by Dr. Elaine Chaplin, based on standard intelligence and psychological tests administered to Jennifer under her supervision. The report noted that Jennifer's performance and verbal I.Q. scored in the superior range. She was found to be intellectually advanced, highly verbal, perceptive, possessed of a great wealth of information, highly observant and a quick learner. Her verbal scores were notably above grade level.

While Jennifer did not manifest any significant problems she experienced difficulties with perceptual organization that resulted in reading scores well below her potential. The test scores

indicated a disparity of development. Notwithstanding those cautions, the test results and testimony reveal that Jennifer is an intellectually gifted child with a superior academic [9] potential that established that Jennifer has the capacity to benefit from private school education.

The evidence respecting Respondent's finances established that he could easily afford the costs of a private school education for Jennifer, and that provision of a private school education represent the norm rather than the exception for persons enjoying his finances.

The concatenation of the child's ability and Respondent's means constitute the special circumstances which justify the conclusion that the cost of private school education is a proper element of support for Jennifer. Kotkin v. Kerner,

29 A.D.2d 367 (1st Dept., 1968); Hahn v. Hahn, 40 A.D.2d 624 (4th Dept., 1972); Ellen N. v. Stuart K., 88 Misc.2d 280 (Fam. Ct. Onondaga Co., 1976).

The exact amount that should be allocated to private school education is less readily susceptible of calculation since Jennifer is not presently enrolled in private school. This is a classic example of how Petitioner's lack of means precludes offering proof of a necessary element of support with an actual bill reflecting its costs.

In its stead, Petitioner communicated with several private schools and obtained information respecting the programs offered and their costs. These were embodied in Petitioner's Exhibit 41 in Evidence.

There has been no undertaking that Jennifer had applied to any of these schools nor guarantees that she would be

accepted at any of them. In the event that such an event occurs the order to be settled should provide for [10] including but not limited to transportation, books, meals, contributions, activities fees and charges, and uniforms.

In addition, Petitioner presented proof respecting the cost of kindergarten and first grade private school expenditures.

Jennifer was enrolled at Glendale Baptist from September 1981 through June 1982. Petitioner incurred costs of $750 for tuition, $25 for registration and $100 for uniforms, a total of $875.

Jennifer attended Our Savior Lutheran School from September 1982 through December 1982, causing Petitioner to incur tuition costs of $380.50 for registration and tuition and $200 for uniforms.

Petitioner placed Jennifer in a home

study program in January 1983, and expended $330 for teaching materials. These sums aggregate $1,835 for which she is entitled to reimbursement of 95% of $1,743.25.

B. Shelter

If there be one on-going theme in this opinion it is the tension between Petitioner's extremely limited means, and Respondent's ability to meet an award that would support a singularly lavish luxury laden life style.

Neither what Petitioner has spent or what Respondent can afford is the appropriate standard. Nor are other decisions especially instructive since all of them rest primarily on the widely divergent fact patterns brought before the court in each particular case.

Petitioner resides in a two-family house in Glendale, which is owned by her mother. Her rent is $350 a month inclu-

ding utilities. There was no indication whether [11] this sum represents fair market value, or whether it reflects a discount or premium. Petitioner stated that her home is located in a "blue collar" neighborhood in Queens, a characterization unchallenged on cross examination.

There was meager testimony offered respecting alternative living accommodations. One such was to a two-bedroom apartment in Garden City, New York, which rented for $800 a month.

It is important to note that Kathy [J. (Anonymous)] is not entitled to have her personal standard of living elevated through the guise of providing for the child. However, some instances arise where unless Jennifer were to be penalized the two would be inextricably linked.

This is particularly true with

respect to living accommodations. There can be no argument made that Respondent's child should not live in an attractive neighborhood and possess her own bedroom.

While one might argue that a one-bedroom apartment might fulfill that requirement, it could be done only if part of the living area was utilized as Petitioner's sleeping quarters, an unwarrantably harsh diminution of the quality of Jennifer's life style.

After consideration of the credible evidence, I find it proper to allocate $450 a month or $104 per week for Jennifer's shelter and utilities needs.

C. Food

Respondent's counsel commented on the lack of receipted bills or breakdowns relating to the cost of food for Jennifer. While other areas of inquiry provide notable opportunity to inflate and exaggerate costs, the Court is [12]

well able to assess the reasonableness of the claim for Jennifer's food costs even absent corroborating documentation. Ellen J. v. Stuart K., supra. Petitioner claimed that she spent $100 per week for herself and Jennifer for food consumed in their home, and allocated one half of this cost to Jennifer. The Court credits this testimony, and finds that Jennifer's food costs total $50 per week.

D. Entertainment & Travel

In contrast to food costs, the area of entertainment expenses provides fertile grounds for exaggeration and extravagant expenditures. The situation is not ameliorated by Petitioner's decided inability to furnish financial particulars that are accurate or precise.

Petitioner's entertainment expenditures for Jennifer fall into the categories of recreation, parties, dining

out, and vacation trips.

Petitioner did not give a specific figure for recreation but the various activities such as movies, broadway shows, roller skating, and amusement parks warrant a finding of a weekly expenditure of $10.

Petitioner testified that she spent approximately $450 a year on parties for Jennifer, an average of $8 per week.

She further testified that it was her custom to dine out with Jennifer and that she spent approximately $100 a month for the two of them. I apportion one-half of this expenditure to Jennifer, which translates into a weekly expense of $12.

Petitioner mentioned several trips to the Amish [13] Country which she took with Jennifer sometimes accompanied by other family members. There were also trips to Oakland, New Jersey and Schroon

Lake, New York, and Montreal.

These trips were taken in an automobile successively registered to Diane and Ruth [J. (Anonymous)]. No mention was made of the costs involved.

There were 3 occasions on which Petitioner took Jennifer to California. Petitioner gave no testimony regarding the cost of the trips, or how it was apportioned.

Petitioner's maiden aunt, Dorothy [K. (Anonymous)], was apparently the source of Petitioner's funds for these trips.

She testified that on one occasion she lent Petitioner $1,500 for herself, and $1,500 for Jennifer for the first California trip which the three of them took. She also supplied $2,000 for their combined expenses.

While Mrs. [K. (Anonymous)] testified that these moneys, as well as

multitudinous sums given by her to Petitioner were loans, the Court is disinclined to view them as anything but gifts from a childless aunt to a favorite niece and grand niece.

There are no records of these transactions let alone ones that would substantiate indebtedness.

The contrary is very much the case. Mrs. [K. (Anonymous)] testified that on the one occasion when Petitioner gave her an IOU evidencing an indebtedness of $3,000 she tore it up.

While the Court is not inclined to view the moneys paid over by Mrs. [K. (Anonymous)] to Petitioner in toto as a regular source of funds, it will consider these payments in computing Petitioner's income. Blickstein v. Blickstein, 472 NYS 2d 110 (App. Div. 2nd Dept., 1984). It is [14] appropriate however, that some allowance for travel be included in the

order of support, and the Court awards $25 a week for this item.

E. Clothing

Petitioner stated that she spent approximately $500 per season for Jennifer's clothing, but slightly more in the winter. In addition she spent $250 for uniforms. Accordingly, Jennifer's clothing needs are fixed at $2,500 or $48 per week.

F. Obstetrical and Medical

Petitioner stated that she borrowed approximately $500 to pay the fees of her obstetrician.

Petitioner's Exhibit 33 in Evidence encompasses some of the medical, laboratory and pharmaceutical expenses incurred by Petitioner on behalf of Jennifer. They total $296.25.

Respondent is directed to pay the lump sum of $796.25 to reimburse Peti-

tioner for these outlays.

Exhibit 8 in Evidence, Respondent's 1981 tax return indicates that he deducted $150, the statutory maximum for medical insurance premiums.

Since he carries medical insurance for himself and his family, he is directed to include Jennifer under his plan for medical, dental and prescription coverage. In the alternative he may elect to cover her under a separate policy so long as it provides the same benefits. In addition he shall be responsible for 95% of any amount deductible.

IV. Petitioner's Income & Expenses

Since the Family Court Act makes each parent [15] equally responsible for the support of their child(ren) in a manner proportionate to their respective means, it is necessary to determine Petitioner's income and expenses.

Petitioner obtained her G.E.D. during the 1½ year period in which she attended Queens College. Her employment experience is minimal, and no more recent than 1975.

While she is well spoken, poised and reasonably intelligent, any reference to earnings would necessarily be based on potential.

However, during the last seven years she has received an average of $5,200 annually in Court Ordered child support.

In addition, she testified that she received large sums of money from various members of her family which she claims were loans.

While it is obvious that Petitioner's aunt, Dorothy [K. (Anonymous)] regularly furnished her with sums of money which may well have aggregated $20,000, the Court has previously articulated its belief that these payments were

actually gifts from an aunt to a favorite niece and grand niece, the natural repositories of her interest and bounty.

I simply cannot believe that petitioner's sister, Diane [J. (Anonymous)], loaned her $5,000. Diane [J. (Anonymous)]'s testimony was vague, selectively informative, and thoroughly discredited on cross examination.

She was convincingly impeached respecting the purchase of a new 1981 Datsun. She was less than candid when she could not remember whether she had paid for the car with cash, or used either a commercial bank or savings bank check even though she was unable to recount when she was [16] last employed, or was discharged from military service.

Her purported lack of remembrance is not surprising. At a point close in time to the purchase of the car, Dorothy [K. (Anonymous)] had withdrawn $7,000 from

one of her own Federal Savings and Loan Association accounts, and the same day had the bank issue a check to Nemet Motors, the dealer from whom Diane [J. (Anonymous)] acquired the Datsun.

This was not the first time that Dorothy [K. (Anonymous)]'s moneys had been used to purchase a care for one of her [J. (Anonymous)] nieces.

Considerable time was devoted to the circumstances surrounding the purchase of a 1980 Oldsmobile which Petitioner claimed she used to take Jennifer to her school. It was also used for Jennifer's health, cultural, and recreational activities as well as vacation trips.

Petitioner claimed that she borrowed the money to pay for the car from Dorothy [K. (Anonymous)], but had it registered first in her sister's name, and then in her mother's name. She did so to conceal this valuable asset from the Department

of Social Services.

This flagrant act of duplicity offends the conscience of the Court. Petitioner is not allowed any recompense for the car's purchase or maintenance. Since Petitioner, her aunt, and sister were all aware of this deceitful machination, they all suffer a diminution of credibility.

The Court is sympathetic to the fact that the recent death of Petitioner's brother had rendered Petitioner's mother so grief stricken that she was in no condition to give testimony. Nonetheless Petitioner had [17] testified that all her family's money was kept in accounts that always had 2 or more relatives as signatories. She had shown a comprehensive and detailed knowledge of which of the numerous accounts belonged in actuality to which relative. And yet in contrast to the detailed tracing of

payments from Dorothy [K. (Anonymous)] to Petitioner no proof was forthcoming, let alone admitted into evidence, suggesting that Ruth [J. (Anonymous)] made any loans to Petitioner.

Respondent misperceives the significance of the effect of the loans on two counts. He believes that evidence of the loans was introduced "to enhance in the mind of the Court the amount of money needed for necessary support and education." He also argues that Respondent is not responsible for the loans made to Petitioner. His position is correct with respect to the second ground, but gratuitous. Petitioner made no claim for reimbursement, no would the Court have allowed it.

With respect to the first point, while money actually spent is probative of the amount appropriate for necessary support and education, it is not the sole

determinant as Respondent readily acknowledges. It is therefore regrettable that Petitioner resorted to these fabrications since they were unnecessary.

The Court's assessment of Petitioner's credibility strongly impacted its decision respecting a number of items considered in determining the appropriate level of support. Credibility is a compendium of many elements, most prominently those of veracity and accuracy.

The Court's confidence in Petitioner's veracity was seriously undermined by her machinations with respect to [18] the ownership of the Oldsmobile, her responses to the Department of Social Services respecting her assets, and her testimony respecting funds allegedly advanced by her mother and sister.

The Court's lack of confidence in the accuracy of Petitioner's statements was occasioned by Petitioner's vague and

imprecise recollection of mundane financial details, and her apparent lack of recollection with respect to reoccurring conversations with officials of the Department of Social Services. They were in glaring contrast to her demonstrated ability to detail the labyrinthine financial details of her family's savings accounts.

Petitioner has shown herself to be vague and imprecise about moneys throughout the course of the proceeding. She consistently confused sources of funds, as well as their application. She seemingly blurred the distinction between sums to be used for her daughter's benefit and those for herself. This was most evidence respecting trips taken to California.

Petitioner's confusion over her finances was strongly demonstrated by her statements about the proceeds of the June

19, 1980 check for retroactive child support in the amount of $5,400.

Petitioner maintained in the course of 8 affidavits that she lacked any funds to pay her attorney a counsel fee, a position reflected in Petitioner's attorney affidavits. Some of these affidavits however spoke in terms that clearly stated that no moneys were paid over when in undisputed fact Petitioner's attorney retained some $3,000 for disbursements.

[19] While blame for these inexact and therefore misleading statements must be ascribed to Petitioner's attorney who drafted petitioner's affidavits, it also diminishes the Court's perception of Petitioner's capacity for accurate characterization of facts.

The Court after weighing the testimony and evaluating the credibility of Petitioner and her witnesses concludes

that Petitioner has the potential to earn $250 per week, and that her legitimate expenses total $150 per week.

V. The Award of Support

The language of F.C.A. § 545 directs the Court "to fix a fair and reasonable sum according to their (the parent's) respective means as the Court may apportion."

I do not read this language to require me to make an award based on a precise mathematical formula. If such were the case, Petitioner's weekly contribution would likely be calculated in cents rather than dollars.

Instead the Court will make Petitioner responsible for 5% of Jennifer's expenses.

These expenses comprise on a weekly basis: Parties: $8; shelter: $104; food: $50, clothing: $48; entertainment: $10; dining out: $12; travel: $25. They

aggregate $257 per week of which sum Respondent shall pay $244.15. In addition he shall furnish comprehensive health coverage and be responsible for private school education as provided, supra.

In accordance with Respondent's request it shall be payable to the Support Collection Unit which shall pay it over to Petitioner. F.C.A. § 546.

The temporary order of support of $100 is of course, less than the $236.55 awarded as child support. [20] This necessarily results in the creation of arrears of $136.55 per week. However one cannot determine the arrears accrued by merely taking the number of weeks the temporary order has been in effect, and multiplying that figure by $136.55. Carmen V. v. Bruce R., 80 A.D.2d 560 (2nd Dept., 1981).

Instead the arrears will be retroac-

tive to June 13, 1982. The proof elicited at the hearing which commenced on June 13, 1983 was only for expenses for the year proceeding that date. This period comprises 103 weeks which when multiplied by the weekly arrears of $136.55 totals $14,064.65.

In addition, proof was presented for expenditures previously paid as well as during the year prior to the commencement of the hearing. They were the subject of lump sum awards of $796.25 for obstetrical and medical expenses, and $1,743.25 for educational expenses.

The aggregate of these sums is $16,604.15. This amount shall be paid to the Support Collection Unit no later than eight days after service upon Respondent's attorney of a copy of the order to be settled herein.

Petitioner's counsel has oft reiterated his intention to apply to the Court

for counsel fee.

It was agreed that this aspect of the proceeding would abide the final award of child support.

Accordingly, Respondent's counsel is directed to an affidavit of services as well as an itemized account of disbursements for which recovery is sought. There shall [21] also be filed an affidavit of services by any other attorney who will receive any moneys from the sum awarded for counsel fees. These affidavits shall be submitted by July 5, 1984.

Unless counsel stipulate otherwise a hearing on the application for counsel fees shall be held on July 23, 1984. Sadofsky v. Sadofsky, 78 A.D.2d (2nd Dept., 1980); Olsan v. Olsan, NYLJ April 11, 1984, p. 6, col 3 (1st Dept., App. Div. 1984).

Notify attorneys.

ENTER:

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BRUCE M. KAPLAN

Judge of the Family Court

Dated: New York, New York

June 7, 1984